



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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October 10, 1996

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: CERCLA Section 106(b) Reimbursement Petitions

FROM: Edward E. Reich 
Environmental Appeals Judge

TO: Gail C. Ginsberg
Regional Counsel
U.S. EPA, Region V

Enclosed for your information is a copy of the Environmental Appeals Board's "Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions." This revised guidance supersedes the Board's original guidance, dated June 9, 1994, concerning the submission and review of such petitions.

Copies of the revised guidance are also being provided to all Agency attorneys involved in the defense of reimbursement claims that are currently pending before the Board. The Board will notify such attorneys directly of the extent to which, if at all, the Board intends to apply the revised guidance in its review of claims that are already pending.

Please let us know if you have any questions about this revised guidance.

Enclosure

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U.S. DEPT. OF JUSTICE
Office of the Inspector General
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Counsel

Revised Guidance on Procedures for Submitting
CERCLA Section 106(b) Reimbursement Petitions
and on EPA Review of Those Petitions

Date: October 9, 1996
Environmental Appeals Board

This document is intended solely as guidance. It does not establish a binding norm and is not finally determinative of the issues addressed. This document is not intended to be a synopsis of principles of law. The policies and procedures in this guidance do not constitute a rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable at law by any person. The Agency may take action at variance with this guidance.

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I. INTRODUCTION

This document sets forth guidance* regarding petitions for reimbursement submitted under section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9606(b)(2), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). This guidance describes the contents of reimbursement petitions and the procedures that EPA uses in responding to reimbursement petitions. The full text of section 106(b)(2) is set forth as an appendix to this guidance.

Section 106(b)(2) allows any person who has complied with an administrative order issued under section 106(a) of CERCLA to petition for reimbursement of the reasonable costs incurred in complying with the order, plus interest. To establish a claim for reimbursement, a petitioner must demonstrate that it was not liable for response costs under CERCLA section 107(a), or that EPA's selection of the ordered response action was arbitrary and capricious or was otherwise not in accordance with law.

Section 106(b)(2) is organized in four parts, roughly as follows. Subparagraph 106(b)(2)(A) requires that a petition be submitted to EPA "within 60 days after completion of the required action." Subparagraphs 106(b)(2)(C) and 106(b)(2)(D) describe the substantive grounds for reimbursement. Subparagraph 106(b)(2)(B) authorizes a petitioner to pursue its claim for reimbursement in the appropriate U.S. District Court if EPA denies the claim in whole or in part.

This guidance supersedes the Environmental Appeals Board's June 9, 1994 "Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions," and is effective immediately. The procedures described in this guidance will be applied to all petitions submitted on or after the date of its issuance. The Board will also apply these procedures, to the extent the Board determines it to be practicable, to petitions that were submitted before the date of issuance of this guidance and that have not yet been decided by the Board.

* This document is intended solely as guidance. It does not establish a binding norm and is not finally determinative of the issues addressed. This document is not intended to be a synopsis of principles of law. The policies and procedures in this guidance do not constitute a rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable at law by any person. The Agency may take action at variance with this guidance.

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II. FILING PROCEDURES AND DEADLINES

Petitions for reimbursement should be submitted to EPA's Environmental Appeals Board¹ by certified mail, return receipt requested, at the following address:

Clerk
Environmental Appeals Board (Mail Code 1103B)
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

Alternatively, petitions and supporting materials may be hand-delivered to the Clerk of the Environmental Appeals Board between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (excluding federal holidays), at the following address:

Suite 500
607 Fourteenth Street, NW
Washington, DC 20005

The petitioner should also send a copy of its petition, including attachments, to the EPA Regional program office that issued the underlying administrative order.

Section 106(b)(2) requires that a petition be submitted to EPA "within 60 days after completion of the required action." For the purpose of determining a petitioner's compliance with the statutory 60-day deadline, EPA will look to the postmark date if the petition is sent to the Environmental Appeals Board by certified mail, or the date of receipt by the Environmental Appeals Board if the petition is sent by any other means. In other words, petitions sent to the Board by certified mail must be postmarked not later than the 60th day after the date of completion of the required action. Petitions sent to the Board by any means other than certified mail must actually be received by the Environmental Appeals Board not later than the 60th day after the date of completion of the required action. It is recommended that petitions be submitted to the Board only by certified mail or by hand delivery; to minimize the risk of disputes over timeliness, filing by regular first-class mail is discouraged. If the 60-day time period for filing the petition

¹ The President's authority to implement CERCLA section 106(b) was delegated to the EPA Administrator by Executive Order 12580 (January 23, 1987). The authority to receive, evaluate, and make determinations regarding petitions for reimbursement submitted pursuant to section 106(b) has been delegated to the Environmental Appeals Board. See Delegation of Authority 14-27 ("Petitions for Reimbursement").

with EPA expires on a Saturday, Sunday, or federal legal holiday, the period will be extended to include the next business day.

III. CONTENTS OF THE PETITION

A. Background Information

A petition must include the following background information:

- the petitioner's full name, title, and address;
- the name, title, address, telephone number and fax number of any agent or attorney authorized to represent the petitioner (or, if the petitioner is not represented, the petitioner's own telephone number and fax number);
- the name and address of the facility at which the response action was implemented; and
- the U.S. EPA docket number for the section 106(a) order (a complete copy of the order must also accompany the petition as an attachment).

The petition must be signed by the petitioner or by an attorney representing the petitioner. If the petitioner is not a natural person (e.g., if the petitioner is a corporation), the petition must be signed by the petitioner's attorney or by an agent or officer of the petitioner who is qualified to act as a signatory; for purposes of this requirement, a "qualified" agent or officer means one who satisfies the definition provided in 40 C.F.R. § 270.11(a). The Environmental Appeals Board may at any time require any factual assertion contained in a petition to be substantiated by an affidavit based on the affiant's personal knowledge of the matter asserted.

B. Threshold Matters (Required Assertions re: Petitioner's Eligibility to File)

The Board's first priority, in acting on a petition for reimbursement, is to evaluate the petitioner's eligibility to have its claim addressed on the merits. The petition must therefore present information concerning the following threshold eligibility matters:

- 1) Compliance With the Order: The recipient of a section 106(a) administrative order may seek reimbursement of its costs only if it "complies" with the order. A petition for reimbursement must therefore include a statement indicating that the petitioner has complied

with the order, and evidence supporting that statement must accompany the petition. If the EPA Regional office that issued the order disputes the petitioner's assertion regarding compliance (under the procedures described in Section IV.A, infra), the Board may undertake to resolve that dispute before proceeding to the merits of the petitioner's claim.

- 2) Completion of the Required Action: A petitioner may only present a reimbursement claim for consideration on the merits after completion of the action required by the section 106(a) administrative order. The petition must therefore include a statement indicating that the action has been completed, and evidence supporting that statement must accompany the petition. If the EPA Regional office that issued the order disputes the petitioner's assertion regarding completion (under the procedures described in Section IV.A, infra), the Board may undertake to resolve that dispute before proceeding to the merits of the petitioner's claim.
- 3) Timeliness of the Petition: The petition must also indicate the date on which the action required by the section 106(a) order was completed, so that the Board can determine whether the petition is timely. Very important information regarding compliance with the statutory 60-day filing deadline appears supra in Section II of this guidance, titled "Filing Procedures and Deadlines."
- 4) Incurrence of Costs: The statute requires a demonstration that the costs for which reimbursement is sought are "reasonable." However, there is no need for a petitioner to undertake a full-scale demonstration of the "reasonableness" of the costs being claimed until and unless the Board concludes that reimbursement in some amount is appropriate. Therefore, when initially filing a petition, the only cost information that the petitioner must include is (1) a statement asserting that the petitioner incurred costs in complying with EPA's section 106(a) order, and (2) an estimate of the total costs being claimed by the petitioner. Any dispute concerning the reasonableness of the costs incurred will ordinarily be addressed only after the Board decides that reimbursement of some amount should be awarded. The Board, however, reserves the right to request cost information at an earlier date if it deems such information useful in determining either threshold eligibility issues or a petitioner's entitlement to reimbursement on the merits.

C. Statement of Grounds for Reimbursement

The petition must articulate all legal arguments and all factual contentions (including contentions, if any, regarding technical or scientific matters) on which the petitioner relies in support of its claim for reimbursement.² Except as may be permitted by the Board for good cause shown, and except as specifically provided in Sections III.B(4) and IV.F of this guidance (describing procedures for identifying and submitting cost-related information), no issues may be raised by a petitioner during the petition review process that were not identified in the petition, and no evidence or information may be submitted during the petition review process that was not identified in the petition, unless the petitioner demonstrates: (1) for new issues, that such issues were not reasonably ascertainable as of the date the petition was filed; or (2) for new evidence or information, that the petitioner could not reasonably have known of its existence, or could not reasonably have anticipated its relevance or materiality, as of the date the petition was filed.

The petition must explicitly state, as to each claim set forth therein, whether the claim arises under CERCLA § 106(b)(2)(C) or under CERCLA § 106(b)(2)(D).³ Both subparagraph 106(b)(2)(C) and subparagraph 106(b)(2)(D) expressly place the burden of proof on the petitioner.

² A petitioner may seek leave of the Environmental Appeals Board to amend a petition in order to present information, or to identify evidence, that was not available at the time of the initial filing. A petition must be promptly amended as appropriate to correct or clarify any statements therein that are no longer true, or that are determined not to have been true when made.

³ Any petitioner challenging EPA's decision in selecting an ordered response action should also note that, in the event of a successful challenge, § 106(b)(2)(D) calls for reimbursement of "reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law" (emphasis added). Therefore, when making a claim under § 106(b)(2)(D), the petitioner must be specific in identifying the portions of EPA's order that it seeks to challenge.

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D. Required Attachments

A complete copy of the administrative order on which the petitioner's claim is based must accompany the petition as an attachment. In addition, all other documents on which the petitioner relies in support of its claim must also be submitted as attachments to the petition, except for documents to be relied on solely as evidence of the costs incurred or as evidence of their reasonableness.⁴ Each of the attachments must be separately identified, and the relevance of each attachment to the petitioner's claim briefly explained, in the body of the petition.

IV. AGENCY PROCEDURES FOR PROCESSING SECTION 106(b) PETITIONS

The Environmental Appeals Board will generally evaluate petitions for reimbursement using the following procedures. The Board may, however, exercise its discretion to stay further action on a petition at any time. The Board may, for example, defer consideration of a petition while related settlement discussions or judicial actions are proceeding, or for other good cause. In addition, a petitioner may elect to withdraw its petition, or to withdraw its own claim (e.g., for settlement purposes) from a petition submitted jointly with other petitioners. Whenever a petitioner withdraws or voluntarily dismisses a claim for reimbursement, the petitioner will be permitted to reinstate that claim only if the 60-day statutory deadline (measured from the date of completion of the required action) has not yet expired.

A. Regional Office Response to the Petition

Upon receiving a petition for reimbursement, the Environmental Appeals Board will send a letter to the appropriate EPA Regional office (with a copy to the petitioner) soliciting a response to the petition. The Region must respond in one of two ways:

If the Region contends that one or more of the threshold eligibility requirements discussed Section III.B of this guidance have not been met -- i.e., that the petitioner has failed to comply with EPA's section 106(a) order, that the required action has not been completed, that the petition was not timely filed, and/or that the petitioner has not incurred any costs in complying with a section 106(a) order -- the Region must raise

⁴ Copies of such cost-related documents need only be submitted after the Board issues an Order Granting Reimbursement. See Section IV.F, infra.

those contentions by submitting a limited responsive pleading in the nature of a motion to dismiss the petition. Such a pleading would address only the petitioner's alleged failure to meet the threshold requirements described in Section III.B, and would be treated by the Board as a request to reject the petition without reaching the merits of the petitioner's claims. Because a pleading of this nature would not include a response to the merits of the petitioner's claims, the Region would be expected to file it expeditiously, within thirty days after the date of the Board's letter soliciting a response to the petition.⁵ The petitioner would then be invited to respond to the Region's threshold objections. Once the threshold eligibility issues are fully briefed, the Board will either rule on those issues separately or defer ruling on them until the merits have also been briefed (pursuant to a further order of the Board). The Region would not, by initially filing a responsive pleading in the nature of a motion to dismiss, be deemed to have waived any of its arguments with respect to the merits of the petitioner's claims.

If the Region does not contend that one or more of the threshold eligibility requirements discussed in Section III.B of this guidance have not been met, the Region must submit a response addressing the merits of the petitioner's claims. A response addressing the merits would be due from the Region within sixty days after the date of the Board's letter soliciting a response to the petition. The Region's submission of a response addressing the merits of the petitioner's claims (either on its own initiative or as directed by the Board) in no way limits the Board's authority to reject the petition for failure to satisfy the threshold eligibility requirements described in Section III.B of this guidance.

When the Region submits its first responsive pleading to the Board, addressing either the petitioner's eligibility to seek reimbursement or the merits of the petitioner's claims, the Region must also submit a certified index to the administrative record that the Region compiled in connection with the issuance of the underlying CERCLA § 106(a) order. In addition, the Region must provide the Board with copies of all documents that are relied on in the responsive pleading and that have not already been submitted by the petitioner.

B. Additional Briefing

The Board may at any time require or invite the petitioner and/or the Region to provide such supplemental briefing as the

⁵ The Regional office may request a limited extension of time if necessary to verify whether a petitioner has completed the response action.

Board may deem necessary for an informed resolution of the issues presented. Briefs other than those expressly required or invited by the Board may be submitted only with leave of the Board.

C. Evidentiary Hearings and Oral Arguments

In its sole discretion, the Board may choose to designate a hearing officer (who shall be an EPA employee without prior involvement in the matter under review) to conduct an evidentiary proceeding with respect to any issue of fact that the Board may consider material to the resolution of a reimbursement petition.⁶ Similarly in its sole discretion, the Board may direct the parties to appear before it to present oral argument with respect to one or more specified issues of law. The Board may take either of those actions either in response to a request by a party or on its own initiative.

If the Board determines that an evidentiary hearing or oral argument shall take place, both the petitioner and the Region will be notified in writing of the issues to be addressed and the hearing date and location. Both the Region and the petitioner will be expected to participate in such proceedings; a party's failure to participate may cause adverse inferences or conclusions to be drawn against that party with respect to any matter addressed at the proceedings.

D. Preliminary Decision

The Board's proposed disposition of a petition for reimbursement, whether on the merits or otherwise, will first be issued to the parties in the form of a "Preliminary Decision" on which comments will be solicited (see Section IV.E, infra). If any materials cited in the Preliminary Decision were not furnished by the parties themselves and are not generally available, such materials will either be sent by the Board to all parties along with the Preliminary Decision or be made available for inspection by the parties at the Regional office upon issuance of the Preliminary Decision, as the Board deems appropriate. In addition, if an evidentiary hearing was conducted in connection with the evaluation of a petition, the Board will provide a copy of the hearing officer's recommended decision to the parties along with its own Preliminary Decision.

⁶ If the Board designates a hearing officer to conduct an evidentiary hearing, he or she will be asked to issue a recommended decision to the Board with respect to the issues addressed at the hearing.

E. Comments on the Preliminary Decision

When the Board issues its Preliminary Decision, it will also establish a schedule providing both parties with an opportunity to comment on the decision. The Board expects that it will generally invite such comments according to the following sequence:

If the Preliminary Decision proposes to award reimbursement to the petitioner, the Board will direct the Regional office to submit its comments first. The Board will specify a later date for submission of the petitioner's comments, which may include a response to the Region's comments.

If, however, the Preliminary Decision proposes to deny the petitioner's claim in full, the Board will direct the petitioner to submit its comments first. The Board will specify a later date for submission of the Region's comments, which may include a response to the petitioner's comments.

The comment period following issuance of the Board's Preliminary Decision represents the final opportunity for each party to present its views in relation to the substance of the petitioner's claim for reimbursement under section 106(b)(2). Comments should focus with particularity on the analysis in the Preliminary Decision rather than merely repeating general arguments previously made. To the extent that a party wishes only to reaffirm its reliance on arguments already made to the Board, such arguments need not be repeated at length. Instead, comments of that nature may be submitted in summary form referencing the commenting party's prior submissions.

Before finalizing its determination to grant or deny reimbursement, the Board will review and consider comments relating to any issue previously identified by either party; but the Board will, except in extraordinary circumstances, decline to consider any new claims or new issues sought to be raised during the comment period. Absent extraordinary circumstances, comments should therefore relate only to the issues raised in the petition or in the Region's response to the petition, or to any other matter discussed in the Preliminary Decision.

F. Further Proceedings

After reviewing comments (and responses to comments) submitted by the parties, and making such changes as it deems appropriate in light of those submissions, the Board will issue either an Order Granting Reimbursement or a Final Order Denying Reimbursement. An Order Granting Reimbursement will be issued if the Board determines that a petitioner is entitled to reimbursement of all or any portion of the costs claimed in the petition. A Final Order Denying Reimbursement will be issued

only if the Board determines that no portion of the costs claimed by the petitioner will be reimbursed.

- 1) Final Order Denying Reimbursement: A Final Order Denying Reimbursement represents the Agency's final decision with respect to the petitioner's claim. A petitioner who wishes to file an action in Federal district court under CERCLA § 106(b)(2)(B) must do so within thirty days of receipt of a Final Order Denying Reimbursement. To eliminate any uncertainty as to the date of receipt, a Final Order Denying Reimbursement will be served on the petitioner by certified mail, return receipt requested.
- 2A) Order Granting Reimbursement; Proof of Costs: An Order Granting Reimbursement, in contrast, does not constitute the Agency's final decision with respect to the petitioner's claim, because the amount of reimbursement to be awarded must still be determined. When issuing an Order Granting Reimbursement, therefore, the Board will also direct the petitioner to furnish documentation of all costs that it seeks to recover and that would be recoverable according to the analysis in the Board's Order Granting Reimbursement. According to a briefing schedule established by the Board, the Regional office will then be afforded an opportunity to challenge particular cost items (as unreasonable or otherwise not recoverable), and the petitioner will be permitted to respond to those challenges.⁷

⁷ Because the statute expressly limits reimbursement from the Fund to "reasonable" costs (plus interest), the Board may require a petitioner to submit not only evidence of the costs actually incurred -- which evidence would include, at a minimum, itemized invoices and proof of their payment in full -- but also evidence demonstrating that those costs are reasonable. Proof of "reasonableness" of costs would become particularly important if the Regional office, after receiving the petitioner's initial itemization of the costs being claimed, offers specific reasons for concluding that certain cost items are not reasonable. Although the Board cannot anticipate all possible permutations of these issues, factors relevant to the reasonableness of a petitioner's costs might include: bidding procedures used for a particular project and the number of bids received; reasons for selecting a contractor other than the lowest bidder; cost estimates provided by prospective contractors and the circumstances surrounding any later deviations from those estimates; and the reasons for any unforeseen expansion of a particular project or unforeseen delay in its completion, to the extent that such expansion or delay resulted in additional costs. Petitioners should take care to retain documents

- 2B) Final Order Granting Reimbursement: After the cost issues have been briefed, the Board will issue a Final Order Granting Reimbursement. A Final Order Granting Reimbursement represents the Agency's final decision with respect to the petitioner's claim. A petitioner who wishes to file an action in Federal district court under CERCLA § 106(b)(2)(B) must do so within thirty days of receipt of a Final Order Granting Reimbursement. To eliminate any uncertainty as to the date of receipt, a Final Order Granting Reimbursement will be served on the petitioner by certified mail, return receipt requested.

The Board's final decisions under CERCLA § 106(b)(2) are available on a current basis on LEXIS, WESTLAW, and the World Wide Web (<http://www.epa.gov/eab>). The Board's decisions are also published periodically in a series of bound volumes titled Environmental Administrative Decisions, available for purchase from the Superintendent of Documents, U.S. Government Printing Office (telephone: 202-512-1800).⁸ For the convenience of litigants and the Board, the Board encourages the citation of Board decisions to the appropriate volume of the Environmental Administrative Decisions, if the cited decision appears therein.

V. FURTHER INFORMATION

For further information concerning the matters addressed in this guidance, contact Stuart Cane, Environmental Appeals Board (1103B), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, (202) 501-7060.

and other evidence bearing on such matters, and should be prepared to submit such evidence to the Board upon request.

⁸ When contacting GPO regarding Volumes 1 through 4 of the Environmental Administrative Decisions, please refer to GPO Order No. 055-000-00538-8. When inquiring as to Volume 5, please refer to GPO Order No. 055-000-00545-1. Volume 6 will be published during 1997.

APPENDIX

CERCLA Section 106(b)(2) provides:

(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of Title 28.

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